FOURTH AMENDMENT: WARRANTLESS STOPS ….. Revised December 2017

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I. CONSENSUAL ENCOUNTERS

Whenever a police officer restrains a person's freedom to walk away, he has seized that person, and such a seizure implicates the Fourth Amendment. *Terry v. Ohio,* 392 U.S. 1, 16 (1968). Officers may not involuntarily detain individuals "even momentarily without reasonable, objective grounds for doing so." *Florida v. Royer,* 460 U.S. 491, 498 (1983).

Not all encounters between police and citizens constitute seizures, and not all seizures are constitutionally unreasonable. Encounters that are entirely consensual do not implicate the Fourth Amendment. A police officer may approach an individual and ask questions without running afoul of the Fourth Amendment; so long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual, and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. Police officers are thus free to ask questions of persons they encounter as long as the police do not convey a message that compliance with their requests is required. *State v. Serna*, 235 Ariz. 270, 272, ¶ 8 (2014). But police interactions with members of the public are inherently fluid, and what begins as a consensual encounter can evolve into a seizure that prompts Fourth Amendment scrutiny. Thus, the relevant question is not simply whether the encounter was consensual at the start, but whether at some point it became non-consensual, thus triggering Fourth Amendment protections. *Id.* at 272-73, ¶ 10.

In *Serna,* ASC held that a consensual encounter became a seizure when police ordered the defendant to put his hands on his head after he told them he had a gun

because “[a] reasonable person would not have felt free to disregard such a command from a law enforcement officer.” *Serna*, 235 Ariz. at 273, ¶ 12, citing *State v. Rogers,* 186 Ariz. 508, 509-10 (1996) (finding that a reasonable person would not feel free to leave when the officer held out his badge and stated, “police officers, we need to talk to you”); *Gentry v. Sevier,* 597 F.3d 838, 844–45 (7th Cir.2010) (concluding that a *Terry* stop occurred when the officer exited the patrol car and told defendant to keep his hands up). The order and frisk in Serna restrained Serna's freedom to walk away, and thus constituted a seizure for Fourth Amendment purposes; such a seizure requires constitutional justification. *Serna*, 235 Ariz. at 273, ¶ 13.

A seizure occurs when police either use physical force on a suspect, or a suspect yields to a show of authority. An investigatory pursuit does not necessarily translate into a seizure. When police pursue a suspect after a show of authority (e.g., a command to stop), a seizure does not occur until the suspect yields to this authority. However, if a defendant briefly stops after a show of authority and then subsequently flees, a seizure occurs at the time the defendant first stopped, and not when he is ultimately apprehended. *State v. Ramsey*, 223 Ariz. 480, 483, ¶ 12 (App. 2010)(police pulling up onto grass behind pedestrian marked a show of authority, but a seizure did not occur since pedestrian ignored officer’s commands and walked away; seizure occurred when pedestrian, in response to the officer's commands, took one of his hands out of his pockets and placed it on his head).

II. INVESTIGATORY STOP AND FRISK

Terry v. Ohio, 392 U.S. 1, 8 (1968) involved a patrolling police officer stopping for interrogation some men whose conduct had attracted his attention. The officer's

observation led him reasonably to suspect they were casing a jewelry shop in preparation for a robbery; he conducted a pat-down, which disclosed weapons concealed in the men's overcoat pockets. In holding that the interrogation was warranted and the pat-down permissible, SCOTUS established the legitimacy of an investigatory stop in situations where the police may lack probable cause for an arrest. *Id.* at 24. The Court noted that when the stop is justified by suspicion (reasonably grounded, but short of probable cause) that criminal activity is afoot, the police must be positioned to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous. A limited search of outer clothing for weapons serves to protect both the officer and the public is thus reasonable under the Fourth Amendment. *Id.* at 23-24, 27.

Because the balance between the public interest and the individual's right to personal security tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity may be afoot. When making reasonable-suspicion determinations, the courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and

it falls considerably short of satisfying a preponderance of the evidence standard. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002).

Likewise, in Arizona, the assessment of reasonable suspicion is based on the totality of the circumstances, considering such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge. *State v. Fornof*, 218 Ariz. 74, 76, ¶ 6 (App. 2008). In deciding whether the police have a particularized and objective basis for suspecting that a person is engaged in criminal activity, the courts look at the "whole picture," or the "totality of the circumstances." *State v. O'Meara*, 198 Ariz. 294, 295-96, ¶ 7 (2000), quoting *United States v. Cortez,* 449 U.S. 411, 417-18 (1981). By definition, reasonable suspicion is something short of probable cause. One cannot parse out each individual factor, categorize it as potentially innocent, and reject it. Instead, one must look at all of the factors, (all of which would have a potentially innocent explanation, or else there would be probable cause), and examine them collectively. There is a gestalt to the totality of the circumstances test under *Cortez. O'Meara*, 198 Ariz. at 296, ¶ 10.

A. Traffic Stops

Most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. *Berkemer v. McCarty,* 468 U.S. 420, 439, n. 29 (1984). SCOTUS has recognized that traffic stops are "especially fraught with danger to police officers." *Michigan v. Long,* 463 U.S. 1032, 1047 (1983). The risk of harm to both the police and the occupants of a stopped vehicle is minimized if the officers routinely exercise unquestioned command of the situation. *Maryland v. Wilson,* 519 U.S. 408,

414 (1997), citing *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981). In *Arizona v. Johnson*, 555 U.S. 323, 330-32 (2009), SCOTUS set forth three decisions that cumulatively portray *Terry*'s application in a traffic-stop setting: *Pennsylvania v. Mimms,* 434 U.S. 106 (1977)*; Maryland v. Wilson,* 519 U.S. 408 (1997); and *Brendlin v. California,* 551 U.S. 249 (2007).

First, in *Mimms,* the Court held that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." 434 U.S. at 111, n. 6. The government's "legitimate and weighty" interest in officer safety outweighs the *de minimis* additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle. *Id.,* at 110–111. Citing *Terry* as controlling, the Court further held that a driver, once outside the stopped vehicle, may be patted down for weapons if the officer reasonably concludes that the driver "might be armed and presently dangerous." 434 U.S. at 112.

Second, *Wilson* held that the *Mimms* rule applied to passengers as well as to drivers. Specifically, the Court instructed that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." 519 U.S. at 415. "[T]he same weighty interest in officer safety," the Court observed, "is present regardless of whether the occupant of the stopped car is a driver or passenger." *Id.* at 413. It is true, the Court acknowledged, that in a lawful traffic stop, "[t]here is probable cause to believe that the driver has committed a minor vehicular offense," but "there is no such reason to stop or detain the passengers." *Id.* On the other hand, the Court emphasized, the risk of a violent encounter in a traffic-stop setting "stems not from the ordinary

reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop." *Id.*, 414. "[T]he motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver." *Id.* Moreover, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle," *id.,* at 413–414, so "the additional intrusion on the passenger is minimal," *id.,* at 415.

Finally, completing the picture, *Brendlin* held that a passenger is seized, just as the driver is, "from the moment [a car stopped by the police comes] to a halt on the side of the road." 551 U.S., at 263. A passenger therefore has standing to challenge a stop's constitutionality. *Id.,* 256–259. After *Wilson,* but before *Brendlin,* the Court had stated, in dictum, that officers who conduct "routine traffic stop[s]" may "perform a 'pat-down' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous." *Knowles v. Iowa,* 525 U.S. 113, 117–118 (1998). "That forecast, we now confirm, accurately captures the combined thrust of the Court's decisions in *Mimms, Wilson,* and *Brendlin.*" *Arizona v. Johnson*, 555 U.S. 323, 330-32 (2009).

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. In sum, a traffic stop of a car communicates to a reasonable passenger that he or she is not free

to terminate the encounter with the police and move about at will. Police are not constitutionally required to give passengers an opportunity to depart the scene after exiting a stopped vehicle without first ensuring that, in so doing, they are not permitting a dangerous person to get behind them. *Johnson*, 555 U.S. at 333–34.

A law enforcement officer's investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment and must be justified by some objective manifestation the person stopped is, or is about to be engaged in criminal activity. Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause. And reasonable suspicion is a "commonsense, nontechnical concept that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *State v. Evans*, 235 Ariz. 314, 316-17, ¶ 7 (App. 2014), *aff'd,* 237 Ariz. 231, ¶ 7 (2015).

A law enforcement stop of a vehicle constitutes a seizure under the Fourth Amendment and must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity. Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause. In reviewing a claim that law enforcement officers lacked the reasonable suspicion required for an investigatory stop, appellate courts apply a peculiar sort of *de novo* review, slightly more circumscribed than usual, because they defer to the inferences drawn by the trial court and the officers on the scene, not just the court's factual findings. *State v. Gutierrez*, 240 Ariz. 460, 463-64, ¶ 7 (App. 2016).

Police need only possess a reasonable suspicion that the driver has committed an offense to conduct a stop; thus, an officer who has witnessed a traffic violation may initiate a stop. But justification does not give an officer authority to conduct the stop indefinitely. The tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission – to address the traffic violation that warranted the stop and attend to related safety concerns. In other words, authority for the seizure ends when tasks tied to the traffic infraction are – or – should have been – completed. Once the time needed to complete this mission has passed, an officer must allow a driver to continue on his way unless (1) the encounter between the driver and the officer becomes consensual, or (2) during the encounter, the officer develops a reasonable and articulable suspicion that criminal activity is afoot. *State v. Kjolsrud*, 239 Ariz. 319, 322–23, ¶¶ 9-10 (App. 2016)(removing defendant driver from car after traffic stop to undertake further questioning was a detour from the mission of the underlying stop, and because deputy conceded that he could have completed the traffic stop at that time, the detour amounted to an additional seizure under the Fourth Amendment). Reasonable suspicion to extend the detention beyond the traffic stop exists if, under the totality of the circumstances, an officer developed a particularized and objective basis for suspecting the particular person stopped of criminal activity. *Kjolsrud*, 239 Ariz. at 323–24, ¶ 15. Criminal history alone cannot support a finding of reasonable suspicion. *Id*. at 324, ¶ 17.

A.R.S. § 28-982 provides an officer may stop a vehicle “any time there is reasonable cause to believe that a vehicle is unsafe” in order to issue a written notice to the driver. A.R.S. § 28–921 provides a person shall not drive a vehicle “in an unsafe

condition that endangers a person." Police officers frequently engage in "community caretaking functions" involving vehicle stops that are totally divorced from criminal investigations. Evidence discovered without a warrant is admissible under the "community caretaker" doctrine if the intrusion is reasonable. *State v. Becerra*, 231 Ariz. 200, 203, ¶ 8 (App. 2013)(where officer testified that one reason he decided to stop the vehicle was that it caused a danger to other vehicles on the road and he was concerned another vehicle approaching from the rear would not be able to perceive accurately the vehicle's position and could collide with it, stop of car was justified because it was being operated in an unsafe condition), citing: *State v. Mendoza–Ruiz,* 225 Ariz. 473, ¶ 8 (App. 2010); *State v. Organ,* 225 Ariz. 43, ¶¶ 14–18 (App. 2010) (stop of vehicle proper as community caretaking function when reasonable to believe vehicle having trouble); *State v. Harrison,* 111 Ariz. 508, 509 (1975) (proper exercise of police power to stop vehicle for public safety reasons because tire "bouncing").

B. Frisks

Once they have made a stop under *Terry*, police may conduct a "pat-down" or frisk the suspect for weapons if they reasonably suspect that the suspect may be armed and presently dangerous to police or others. *Terry* allows a frisk only if two conditions are met: (1) officers must reasonably suspect both that criminal activity is afoot and (2) that the suspect is armed and dangerous. *State v. Serna*, 235 Ariz. 270, 275, ¶ 21 (2014).

In a traffic-stop setting, the first *Terry* condition – a lawful investigatory stop – is met whenever it is lawful for police to detain an automobile and its occupants. The police need not have, in addition, cause to believe any occupant of the vehicle is

involved in criminal activity. However, to justify a frisk of a passenger during a traffic stop, "just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Gastelum v. Hegyi*, 237 Ariz. 211, 213, ¶ 8 (App. 2015), *quoting Arizona v. Johnson,* 555 U.S. 323, 27 (2009). When an encounter between a police officer and an individual is not based on consent and an officer has a reasonable suspicion both that criminal activity is afoot and that the individual is armed, the officer may conduct a *Terry* frisk without specifically assessing the likelihood that the individual is presently dangerous. *Gastelum*, ¶ 11.

1. Reasonable Suspicion – Armed and Dangerous

Where the initial stop was based on consent, not on any asserted suspicion of criminal activity, the mere presence of a gun cannot provide reasonable and articulable suspicion the gun carrier is presently dangerous in a state such as Arizona which freely permits citizens to carry weapons, both visible and concealed. To conclude otherwise would potentially subject countless law-abiding persons to pat-downs solely for exercising their right to carry a firearm. *State v. Serna*, 235 Ariz. 270, 275, ¶¶ 22-23 (2014). In *Serna*, ASC emphasized this holding governs only those circumstances in which the police wish to search a person with whom they are engaged in a consensual encounter. "In such cases, absent consent, an officer may frisk an individual only when the officer possesses both a reasonable suspicion that the person to be searched has engaged or is about to engage in criminal activity and a reasonable belief that the person is armed and dangerous." *Id*. at 276, ¶ 28.

In *Serna*, ASC established a new rule limiting some *Terry* stops to those occasions when officers reasonably suspect that criminal activity is afoot and that an individual is armed and dangerous. *Gastelum v. Hegyi*, 237 Ariz. 211, 212, ¶ 1 (App. 2015). This is a marked departure from earlier case law, which often *equated* reasonable suspicion that a person is armed with reasonable suspicion that he is dangerous. *Gastelum*, 237 Ariz. at 213, ¶ 6.

i. Traffic Stops – Armed and Dangerous

To conduct a *Terry* stop-and-frisk, an officer must first reasonably suspect that the person is or has engaged in criminal activity; and to proceed from a stop to a frisk, the officer must have reason to suspect that the person stopped is armed and dangerous. *Arizona v. Johnson,* 555 U.S. 323, 326-27 (2009). In *Johnson,* SCOTUS held "in a traffic-stop setting, the first *Terry* condition – a lawful investigatory stop – is met whenever it is lawful for police to detain an automobile and its occupants ... [t]he police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity." *Id.* at 327. But to justify a frisk of a passenger during a traffic stop, "just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.*

Therefore, in the context of a traffic stop, trial court only needed to consider the second prong of *Terry* – whether police had reason to believe that the passenger was armed and dangerous. And if the court finds there was a reasonable basis for believing the passenger might be armed, it need not a finding of whether the passenger was also dangerous. *Gastelum*, 237 Ariz. at 213-14, ¶ 8. *Serna* is expressly limited to consensual

encounters between police officers and citizens on the street. *Serna*, 235 Ariz. at 275, ¶ 28. *Serna* does not control in the context of a person who was lawfully seized during the course of a traffic stop. When an encounter between a police officer and an individual is not based on consent, and an officer has a reasonable suspicion both that criminal activity is afoot and that the individual is armed, the officer may conduct a *Terry* frisk without specifically assessing the likelihood that the individual is presently dangerous. *Gastelum*, 237 Ariz. at 214, ¶ 11 (App. 2015).

2. Scope of Frisk

A *Terry* frisk is limited in scope; it may not exceed that necessary to protect the officer's safety. The officer may conduct the pat-down solely to determine whether the person is in fact carrying a weapon. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. Accordingly, the search must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *State v. Valle*, 196 Ariz. 324, 327, ¶ 9 (App. 2000). Reaching into a person's pocket exceeds the proper scope of a *Terry* pat-down, as this is "part of a fishing expedition for evidence of crime." *Id*. at 328, ¶ 11. Further, asking a person to remove their shoes exceeds the bounds of *Terry* absent any evidence the officer had a reasonable, articulable suspicion that the person might have a weapon in his shoes. *Id*. at 329, ¶ 14.

In *Valle*, during the pat-down, the officer felt an object in the right front pocket of Valle's pants and reached in to retrieve it without first determining what it was. The Court held the officer's action was not justified under either *Terry* or the plain feel doctrine because there was no evidence the item was readily identifiable as either a

weapon or contraband. *Terry* would have permitted the officer to remove the object from Defendant's pocket only if he believed that it was a weapon, or if the officer knew, by its feel, that the item was contraband. *Id*. at 328, ¶ 12. The Court also found nothing in the record to show that the officer justifiably believed Valle might actually have hidden a weapon in his shoe or, if he had, that he would have been able to quickly retrieve it. *Id*., ¶ 14. However, the Court noted, "Our ruling today does not foreclose the very real possibility that an officer may in an individual case have a reasonable and articulable suspicion that a suspect is carrying a weapon in his or her shoe and that that weapon is sufficiently accessible to the suspect to present a possible danger to the officer or others." *Id*. at 330, ¶ 18.

Compare, *State v. Vasquez,* 167 Ariz. 352 (1991). There, a domestic violence suspect who had been drinking and was emotionally upset asked for his jacket before entering a police vehicle; the officer responded he would have to search the bulky jacket before he could give it to the suspect. In one of the pockets, the officer found cocaine. Finding the search reasonable, ASC focused upon the volatile nature of domestic dispute encounters and the crucial question "whether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 355. The Court noted that because of the bulkiness of the jacket, the officer could not tell from the pat-down alone what, if anything, the jacket pockets contained; a dangerous weapon may well have been inside. *Id.* at 356. *See also State v. Ahumada*, 225 Ariz. 544, 548-49, ¶ 15 (App. 2010)(under the plain-feel exception to the warrant requirement, an officer may reach into a suspect's pocket and seize an item of contraband if the officer lawfully pats down a suspect's outer clothing and feels an

object whose contour or mass makes its identity immediately apparent); *Pima County Juv. Action No. J–103621–01,* 181 Ariz. 375, 378 (App.1995) (in order to seize an item discovered by feel in a pat-down search, the officer must have probable cause to believe that the item is contraband).

III. NO INDIVIDUALIZED SUSPICION

A. Protective Sweeps

Protective sweeps were first recognized in *Maryland v. Buie,* 494 U.S. 325 (1990). Relying heavily on *Terry v. Ohio,* 392 U.S. 1 (1968), and *Michigan v. Long,* 463 U.S. 1032 (1983), *Buie* held that "incident to [an] arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." 494 U.S. at 334. But to justify a broader sweep, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing danger to those on the arrest scene." *Id. Buie* thus authorizes two types of protective sweeps: one involving the area "immediately adjacent" to the place of arrest, which does not require reasonable suspicion, and a second involving other areas, which requires a reasonable belief, supported by specific and articulable facts, that the area harbors someone who could pose a safety threat. *State v. Manuel*, 229 Ariz. 1, 5, ¶ 18 (2011), citing *State v. Fisher,* 226 Ariz. 563, 565–66 ¶¶ 8–9 (2011).

Although ASC previously upheld protective sweeps based on exigent circumstances, *see, e.g., State v. DeWitt,* 184 Ariz. 464, 467 (1996) (warrantless entry

of home justified by burglary in progress); *State v. Greene,* 162 Ariz. 431, 433 (1989) (upholding "protective walk-through" of residence when initial entry was based on an exigency), the Court first applied the *Buie* test in *State v. Fisher,* 226 Ariz. 563 (2011). In *Buie*, officers conducted a protective sweep after arresting the defendant inside his residence, whereas in *Fisher*, the defendant was detained outside his apartment and not arrested until after the protective sweep. ASC assumed, but did not decide, that a protective sweep is permitted when a suspect is detained and questioned but not yet arrested outside of a residence. The Court noted that *Buie* teaches that a protective sweep of a residence is permissible only if the officers have a reasonable belief supported by specific and articulable facts that a home harbored an individual posing a danger to the officers or others; conversely, if officers act purely on speculation, a protective sweep is unreasonable. The Court noted the common thread among cases interpreting *Buie* is that officers must have specific articulable facts that someone who could pose a safety threat is inside a residence. The more specific facts supporting a reasonable belief that an area contains a potentially dangerous individual, the more likely the protective sweep is valid. *Fisher*, 226 Ariz. at 566, ¶ 10-13.

However, lack of information cannot provide an articulable basis upon which to justify a protective sweep. In *Fisher*, ASC concluded that officers cannot conduct protective sweeps based on mere speculation or the general risk inherent in all police work. Because the officers did not articulate specific facts to establish a reasonable belief that someone might be in the apartment, the Court held the protective sweep was invalid. The Court noted although police officers have an incredibly difficult and dangerous task and are placed in life threatening situations on a regular basis, the

Fourth Amendment foreclosed the possibility of allowing police to do whatever they feel necessary, whenever they needed to do it, in whatever manner required, in every situation in which they must act. Further, although suppressing evidence comes at a high cost, the right to privacy in one's home is basic to a free society. Thus, ASC concluded that specific facts, and not mere conjecture, are required to justify a protective sweep of a residence based on concerns for officer safety. *Fisher*, 226 Ariz. at 567, ¶¶ 14-16.

Compare *State v. Manuel*, 229 Ariz. 1 (2011). There, ASC found the search of the defendant's hotel room was justified under the first *Buie* exception; the room was immediately adjacent to the place where Manuel was arrested and another was detained, and thus police could sweep the room even without reasonable suspicion that someone was inside. Because the police were authorized to conduct a protective sweep of the room, the question became whether they lawfully discovered a pistol while conducting the sweep. ASC noted that *Buie* permitted the officers to look under the hotel bed because a person could have been hiding there. The police testified that, because of safety concerns, their usual practice is to look under a bed by lifting its mattress and box spring. The record showed that the officer saw the gun when he lifted the box spring, and ASC concluded he was entitled to lift up the bed and discovered the gun in plain view. *State v. Manuel*, 229 Ariz. 1, 5–6, ¶¶ 18-21 (2011).

The police may, under certain circumstances, make a warrantless protective sweep of a residence if they are lawfully inside the residence and they reasonably perceive an immediate danger to their safety. *State v. Rodriguez*, 205 Ariz. 392, 402, ¶ 38 (App. 2003), *citing* ***State v. Kosman,*** 181 Ariz. 487, 491 (App.1995); *Maryland v.*

Buie, 494 U.S. 325 (1990). Whether the arrest occurs inside or outside the residence is unimportant if the exigencies supporting the protective sweep are present. But despite a belief in the likelihood that a confederate of an arrested individual may almost always be in the arrestee's apartment, the police must articulate reasonable grounds for believing that the suspected accomplice is indeed there. An unsubstantiated belief that confederates may gather in a single apartment does not suffice to permit the police to search an apartment that they would otherwise lack a valid basis to search. *State v. Kosman*, 181 Ariz. 487, 491-92 (App. 1995) (while odor of burning marijuana emanating from apartment would justify officers' entry into apartment to conduct protective sweep, it is insufficient where court did not believe that the officer smelled marijuana).

B. Fixed Border Checkpoint

There are four SCOTUS cases discussing the parameter of border checkpoints. First, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court found unconstitutional a vehicle search by a *roving* patrol unit looking for undocumented aliens based not on consent or probable cause, but simply on the car's being located in the general vicinity of the border. The Court noted it is within the power of the Federal Government to exclude aliens from the country, and this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders; travelers may be stopped in crossing an international boundary because of national self-protection reasonably requiring people entering the country to identify themselves as entitled to come in, and their belongings as effects which may be lawfully brought in. The Court further noted that whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may take place not only at the

border, but at its functional equivalents as well; *e.g.*, an established station near the border, at a confluence of two or more roads that extend from the border, or passengers and cargo of an airplane arriving at an inland airport after a nonstop flight from Mexico City. “But the search of an automobile by a roving patrol, on a road that lies at all points at least 20 miles north of the Mexican border, in the absence of probable cause or consent, violates the Fourth Amendment.” *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

Second, the Court announced in *United States v. Ortiz*, 422 U.S. 891 (1975) that *fixed* remote checkpoint vehicle searches without consent or probable cause were improper under the Fourth Amendment. The Court noted the Fourth Amendment’s reasonableness requirement may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation. While the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the *stop*, which is considerably less intrusive than a search, they do not make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails, nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Further, the Court was not persuaded that a checkpoint limits to any meaningful extent the officer's discretion to select cars for search. To protect such an invasion of privacy from official arbitrariness, the Court has always regarded probable cause as the minimum requirement. *Ortiz*, 422 U.S. at 895-96. The Court concluded: “We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in *Almeida-Sanchez*. We therefore follow that decision and hold that at traffic

checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause." *Id*. at 896-897.

Thus, after *Almeida-Sanchez* and *Ortiz*, probable cause or consent is necessary for either roving patrol stops removed from the border or permanent checkpoint stops removed from the border.

Third, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court decided the Fourth Amendment standard to be applied when automobiles are stopped by a roving patrol for the purpose of a brief inquiry – not a search. "[W]hen an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." 422 U.S. at 881. But the suspicion must be reasonable; that is, it must be particularized such that it does more than simply describe large numbers of others who are also driving on the highways in that vicinity and at that time: "To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.* at 882.

The Court noted that the nature of undocumented alien traffic and characteristics of smuggling operations tend to generate articulable grounds for identifying violators; consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. The Court held it is not reasonable under the Fourth Amendment to make such stops on a random basis; although the

broad congressional power over immigration authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens. *Brignoni-Ponce*, 422 U.S. at 883-884.

The Court concluded that except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. The Court noted any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area, such as the characteristics of the area in which the vehicle is encountered, its proximity to the border, the usual patterns of traffic on the particular road, previous experience with alien traffic, information about recent illegal border crossings in the area, the driver's behavior, aspects of the vehicle itself, and the characteristic appearance of persons who live in Mexico, such as mode of dress and haircut. In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling. *Brignoni-Ponce*, 422 U.S. at 884-885.

The Court noted that the officers in the instant case relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. The

Court held this did not furnish reasonable grounds to believe that they were aliens, noting that large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry and even in the border area a relatively small proportion of them are aliens. Thus, the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens. *Brignoni-Ponce*, 422 U.S. at 886–87 (1975).

"[W]hen a profile substantially resembles the description of vast numbers of law-abiding citizens, and further observations do not develop a reasonable basis for articulable suspicion that the particular individual under observation is an illegal alien or is engaged in other criminal activity, the Fourth Amendment will not permit an automobile stop and a subsequent criminal charge. To hold otherwise would do injustice to principles of fundamental fairness established under the Constitution for the protection of all citizens, including our minority citizens." *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 121 (1996) (circumstances of mere glance of defendant's eye, intuitive suspicion by agent, scratching of defendant's head, slouched passenger, and firm grip on steering wheel were insufficient to justify investigatory stop of defendant's vehicle to check for illegal aliens; defendant was substantial distance from Mexican border, his vehicle did not appear heavily loaded or type of vehicle often used by illegal aliens, he did not drive erratically or engage in obvious attempt to evade agent, and although he and his passenger both appeared to be Hispanic, evidence did not suggest that their clothing or hair styles indicated that they were residents of Mexico); *see also State v. Maldonado,* 164 Ariz. 471, 472 (App.1990) (holding illegal border control stop based on

nothing more than the year, type, and cleanliness of vehicle, apparent nationality of the driver and passenger, style of clothing, apparent lack of conversation between driver and passenger, and driver's manner of holding the steering when patrol car approached; observations were descriptive of too many individuals to create a reasonable suspicion that this particular defendant was engaged in criminal activity).

Finally, the fourth major border checkpoint case is *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), involving a permanent checkpoint away from the border at which all northbound vehicles were stopped. The Court held it is constitutional for border patrol to routinely stop or slow automobiles at a permanent checkpoint and thereafter refer motorists selectively to a secondary inspection area for questions about citizenship and immigration status on the basis of criteria that would not sustain a roving-patrol stop, even if such referrals were made largely on basis of apparent Mexican ancestry.

In reaching this conclusion, the Court recounted the previous three cases. The Court noted that in *Almeida-Sanchez*, the question was whether a roving-patrol unit constitutionally could search a vehicle for illegal aliens simply because it was in the general vicinity of the border; the Court held that a search could be conducted without consent only if there was probable cause to believe that a car contained illegal aliens, at least in the absence of a judicial warrant authorizing random searches by roving patrols in a given area. In *Ortiz*, the Court held the same limitations applied to vehicle searches conducted at a permanent checkpoint. But in *United States v. Brignoni-Ponce*, the Court recognized that other traffic-checking practices involve a different balance of public and private interests and appropriately are subject to less stringent constitutional

safeguards. There, the question was under what circumstances a roving patrol could stop motorists in the general area of the border for brief inquiry into their residence status; the Court held that a roving-patrol stop need not be justified by probable cause and may be undertaken if the stopping officer is aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that a vehicle contains illegal aliens. *Martinez-Fuerte*, 428 U.S. at 555–56.

The Court noted that maintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border and that there is a substantial public interest in the practice of routine stops for inquiry at permanent checkpoints. These checkpoints are located on important highways; in their absence such highways would offer undocumented aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and undocumented aliens who succumb to the lure of such highways, and the prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols. A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly. Martinez-Fuerte, 428 U.S. at 556–57.

The Court further noted that while the need to make routine checkpoint stops is great, the intrusion on Fourth Amendment interests is quite limited; the stop does

intrude to a limited extent on motorists' right to free passage without interruption and arguably on their right to personal security, but it involves only a brief detention of travelers during which all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States. Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. Although this objective intrusion the stop itself, the questioning, and the visual inspection also existed in roving-patrol stops, the Court viewed checkpoint stops in a different light because the subjective intrusion on the part of lawful travelers is appreciably less in the case of a checkpoint stop. *Martinez-Fuerte*, 428 U.S. at 557–58.

Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there

was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review. Martinez-Fuerte, 428 U.S. at 559.

The Court held that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints, and that it is constitutional to refer motorists selectively to a secondary inspection area on the basis of criteria that would not sustain a roving-patrol stop – even if such referrals are made largely on the basis of apparent Mexican ancestry. Since the intrusion is sufficiently minimal that no particularized reason need exist to justify it, it follows that Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved. *United States v. Martinez-Fuerte*, 428 U.S. at 563-64. Any further detention must be based on consent or probable cause. *Id*. at 567.

C. Roadblocks for Criminals or Information about Crimes

Police will sometimes set up a roadblock for the purpose of capturing a known dangerous criminal thought to be in a specific area. *See, e.g.*, *State v. Murray,* 184 Ariz. 9, 21 (1995) (defendants "fled in their car, speeding in excess of 85 miles per hour, leaving the highway, running a manned and armed roadblock, and only stopping off-road where a wash prevented the car from proceeding further"); *State v. Bible*, 175 Ariz. 549, 560 (1993) (police "called in a helicopter, set up roadblocks, and alerted the Federal Bureau of Investigations" in response to a child abduction).

In *State v. Tykwinski*, 170 Ariz. 365 (App. 1990), the COA held such roadblocks are constitutionally permissible in situations where the roadblock is an "explicit and neutral plan to discover [a] clear and dangerous threat to the well-being of the

community." *Id*. at 370. In *Tykwinski*, suspects fled after shooting and killing a deputy on a highway near Winslow. During the next several days, the same suspects were involved in the theft of vehicles from local residents and at least one shoot-out with local police. DPS established a roadblock in the area where the suspects had last been seen. About a hundred vehicles were stopped at the roadblock during the one day it was in effect. During the one to two minutes each car was stopped, officers looked in the passenger areas and trunks of all of the vehicles in which the suspects could have been concealed. When the defendants stopped their vehicle at the roadblock, an officer who approached their vehicle smelled burnt marijuana, giving him probable cause to search the vehicle and its occupants. He asked one defendant if he had any marijuana, and the defendant turned over a small amount. Both occupants were detained and their vehicle searched.

The defendants moved to suppress the evidence on the grounds that the original stop at the roadblock violated their rights under the Fourth Amendment and Art. II, § 8 of the Arizona Constitution because the police lacked an individualized suspicion that they were involved in the crime for which the roadblock was established. *Id*. at 366. The trial court denied the motion to suppress and the defendants were convicted. The COA found the actions of the police were reasonable under the circumstances, since they related to a legitimate and compelling state interest – capturing armed and dangerous fugitives. The Court stated, "[W]hen a serious crime has occurred, the fourth amendment does not require law enforcement, when conducting a roadblock stop, to have a founded or individualized suspicion that the occupants of a particular vehicle stopped were involved in the crime under investigation." *Id*. at 371. The Court

nevertheless stated, “We do not mean to say that roadblocks are constitutionally permitted in all cases,” and warned, “The operation of the roadblock must be closely related to the task of apprehending the suspects in question and its use must be justified under the circumstances presented.” *Id*.

In *Illinois v. Lidster*, 540 U.S. 419 (2004), SCOTUS considered the validity of a roadblock designed to provide information about the perpetrator of an unsolved offense, and held that individualized suspicion is not required for roadblocks that are not designed to find evidence of wrongdoing by the occupants of the cars being stopped. There, police were trying to solve a fatal hit-and-run accident; there were no leads, so the police set up a roadblock at the accident site exactly one week after the accident. They stopped each car as it came to the checkpoint, handed the occupants a flyer about the hit-and-run, and asked the occupants if they had any information about the hit-and-run car or its driver; the stops took only 15 seconds each. Lidster swerved up to the checkpoint and nearly hit an officer; the officer smelled alcohol on Lidster’s breath and ultimately arrested him for DUI. Lidster challenged the legality of his arrest, arguing that the checkpoint was illegal under *Indianapolis v. Edmond*, 531 U.S. 32 (2000)[1] because the police lacked any “individualized suspicion” to stop him. The Court found the checkpoint was reasonable and thus constitutional. In contrast to the drug interdiction checkpoint involved in *Edmond*, the primary law enforcement purpose of the

[1]In *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000), SCOTUS held that a drug interdiction checkpoint set up primarily for general crime control purposes to discover if “any given motorist has committed some crime,” was unconstitutional, absent special circumstances, because the Fourth Amendment forbids police from making these stops without individualized suspicion of criminal activity.

roadblock in Lidster's case was not to determine whether any of the stopped vehicles' occupants were committing a crime, but to ask the occupants for information about another crime, "in all likelihood committed by others." *Id*. at 423. Noting that the "Fourth Amendment does not treat a motorist's car as his castle," the Court held the Fourth Amendment does not invalidate this kind of brief, information-seeking highway stop and does not require any individualized suspicion. *Id*. at 424.